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No.99-1998

Supreme Court, U.S.
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In the Supreme Court of the United States

RENEE LOWERY, *et al.*, PETITIONERS

v.

CIRCUIT CITY STORES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

This case involved 46 consolidated claims of employment discrimination in promotions at Circuit City's 3,500-person headquarters, brought by nine individual plaintiffs. Of these, 43 were rejected either by the court or by the jury; petitioners prevailed on only three. Although the case was not tried as a class action, the jury nonetheless was permitted to find that Circuit City engaged in a "pattern or practice" of discrimination in promotions because its decision-making was decentralized and "excessively" subjective. The petition presents the following questions, both of which were also presented in an earlier petition in this case (No. 98-972):

1. Whether the court of appeals correctly held that the district court did not abuse its discretion in decertifying a class composed of employees who sought damages based on promotion decisions made by numerous different supervisors and managers and involving widely differing positions.

2. Whether the court of appeals erred in modifying a sweeping injunction entered in reliance on a free-standing finding of a "pattern or practice" of discrimination, when only individual causes of action challenging separate promotion decisions made on a decentralized basis by different decision-makers were being adjudicated, the vast majority of which were found to lack merit.

RULE 29.6 STATEMENT

Circuit City Stores, Inc., has no parent company or non-wholly owned subsidiary, but has two series of common stock. Circuit City Group common stock tracks the performance of Circuit City Stores, Inc., while CarMax Group common stock tracks the performance of CarMax Auto Superstores, Inc. CarMax Auto Superstores, Inc., is a wholly owned subsidiary of Circuit City Stores, Inc., which has retained an equity interest in CarMax Group common stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

Having failed to prove 43 of their 46 claims, petitioners ask this Court to help them avoid the need actually to prove that they were victims of discrimination. In doing so, petitioners go to great lengths to obscure the poverty of their case. Petitioners were never able at trial to identify any discriminatory policy or practice at Circuit City headquarters, where the racial composition of the workforce belied any claim of systematic discrimination. Instead, petitioners contended that the company's decentralized, non-bureaucratic approach to promotions made it easier for individual supervisors to engage in specific acts of intentional discrimination in making promotions for widely varying positions. Petitioners could not prove that widespread intentional race discrimination in promotions in fact had occurred, however, or that the absence of rigid promotion criteria had *caused* any discrimination to take place.

1. Circuit City operates a chain of retail consumer electronics stores. At the time of trial, it employed approximately 3,500 people at its headquarters, about 800 of whom were African-Americans. Pet. App. 6a, 32a. The headquarters is organized into about a dozen divisions and subdivisions and more than 100 different departments. C.A. App. 1858, 2948.

Hundreds of headquarters employees work for a subsidiary, First North American National Bank ("FNANB"), which has its own, separate human resources department and its own policies. *Id.* at 2216, 2684-2686; Pet. App. 32a.

Circuit City has grown quickly. To keep pace with that growth, Circuit City, like other companies in similar circumstances, has implemented decentralized personnel practices that avoid regimentation and bureaucracy and instead give those making hiring and promotion decisions wide freedom of action. Pet. App. 33a; C.A. App. 2680-2681. Thus, Circuit City does not use written job descriptions; jobs change too quickly. C.A. App. 2688. Employees are regularly evaluated, however, and promotions are based on several factors, including performance, experience, time in position, and education. See *id.* at 1629-1633, 1819-1820, 1853, 2213, 2874-2875, 2951-2953.

For promotions as for many other functions, Circuit City places most if not all responsibility on the person with immediate supervisory responsibility for the position in question. C.A. App. 2202-2204, 2682. As the evidence showed, this policy of decentralized decisionmaking has "strong support among management experts." Pet. App. 33a. Indeed, "[n]onbureaucratic forms of organization and management" are "hallmarks of rapid-growth companies." Albert, *Human Resources Profit Power: Human Resources, Financial Growth Linked*, 67(2) PERSONNEL 47 (1990). This flexibility in hiring and promotions is linked to a clearly stated non-discrimination policy, in support of which Circuit City requires supervisors to attend a week-long seminar that instructs them, *inter alia*, in appropriate, non-discriminatory management practices. See Pet. App. 10a-11a, 33a.

Circuit City's policies have produced a racially diverse workforce at headquarters. Undisputed evidence showed that, "for each significant occupational category defined by the United States Census Bureau, Circuit City employs more African-Americans than the external labor pool would indi-

cate." Pet. App. 34a. For example, within the "Officials and Managers" category, over 9% of Circuit City's 375 hires between 1992 and 1995 were African-Americans, while the relevant pool was only 4% African-American. *Ibid.* It also was undisputed that, during the relevant period, the 178 promotions received by African-Americans amounted to 18% of all promotions at Circuit City headquarters, and, even more significant, 25% of promotions in which both blacks and whites were in the candidate pool; during the same period, the average proportion of African-Americans in the full-time workforce at Circuit City headquarters was about 19%. C.A. App. 1854-1855, 2962.

2. Despite these circumstances, petitioners' counsel spent 30 months vigorously recruiting clients for a class action against Circuit City from the more than 1,500 African-Americans who worked at headquarters between 1992 and 1995. See C.A. App. 230-231. The cases that were consolidated into this action in the Eastern District of Virginia asserted 50 instances of alleged discrimination in hiring, transfers and promotions at Circuit City headquarters; the nine petitioners accounted for 46 of the 50 claims. Pet. App. 41a. The centerpiece of the suit was petitioners' allegation that Circuit City's failure to use more formal and centralized personnel procedures amounted to a "pattern or practice" of racial discrimination under both disparate impact and disparate treatment theories.

The district court initially certified a mandatory, non-opt-out class comprising all African-Americans who had been employed at Circuit City headquarters after April 1992. Pet. App. 42a. Having certified the class, the district court would not permit Circuit City to communicate with any class members, whether or not they claimed to have suffered discrimination, except with prior consent of class counsel or the district court. *Id.* at 64a-65a. This ban extended to the many African-American employees who ***had*** been promoted and who might have provided useful evidence to counter petitioners' claim that Circuit City engaged in pervasive discrimination. And the district court refused to lift its gag order except as to persons

involved in particular decisions challenged by a named plaintiff, to one plaintiff's current supervisor, and to the secretary for the in-house lawyers responsible for the case.

Petitioners proposed a seven-phase trial plan. Pet. App. 133a-135a. After considering this proposal, the district court *sua sponte* decertified the class, noting "problems of fairness and efficiency." *Id.* at 42a. Nonetheless, the court continued to bar Circuit City from trying to contact sympathetic African-American employees. See C.A. App. 618. The district court also granted summary judgment against three petitioners on all their claims. Pet. App. 44a.

When the trial began, the district court reminded the parties that the case was "no longer a class action" (C.A. App. 2042) and "re-emphasized the procedural posture of the case, stating that '[t]his is a case involving six individual plaintiffs. * * * Don't misunderstand.'" Pet. App. 44a. Petitioners were permitted to introduce evidence of a "pattern or practice" of discrimination to support their individual claims. *Ibid.* In fact, however, petitioners could not point to any particular offensive practice. They instead insisted that "Circuit City's insufficiently regimented management practices" (*ibid.*) had made "individual cases of discrimination possible" (*id.* at 138a) in a context in which dozens of supervisors were choosing whom to promote to dozens of widely dissimilar positions.

To support this theory, petitioners presented a diversity consultant, Dr. Richard Beatty, who testified that Circuit City's non-bureaucratic style did not comport with his view of the "best practices," in part because supervisors could rely on subjective as well as objective criteria in choosing whom to promote. C.A. App. 1031, 2726-2732, 2779-2782. In the opinion of this "expert," one of Circuit City's shortcomings was its failure to hire a full-time diversity specialist of its own. See *id.* at 2775-2777. The diversity consultant conceded that there was no "empirical evidence" that the practices he favored would

produce less discrimination than Circuit City's system. *Id.* at 2816-2817.

Petitioners also relied heavily on a statistical study that failed to control for education, performance, or job experience. See Pet. App. 63a-64a; C.A. App. 1015, 2600, 2608-2609. The district court shielded the statistician's testimony from effective cross-examination, however, by refusing to permit access to the data runs, computer programs, and codes on which the testifying expert's opinions relied, ruling that the materials were non-discoverable because they were prepared by other, non-testifying individuals. C.A. App. 509; see Pet. App. 66a-67a.

In addition, petitioners relied on certain "assumption[s]" made by two amateur surveys, along with a selection of hearsay records of anonymous employee comments made in the course of the surveys. Pet. App. 35a-37a. One of the surveys (conducted by a student, Sarah Cook) was limited to FNANB; of the 800 anonymous responses, eight comments arguably related to race. C.A. App. 1085-1613, 2876-2877. The other study (by administrative assistant Karen Booth) related only to four retail stores and had nothing to do with headquarters. Petitioners also testified about a few isolated discriminatory remarks that were not related to any contested promotion decision and that the declarants denied making. And petitioners paraded into court 17 non-plaintiff current and former employees who testified to their subjective belief that various workplace disappointments resulted from discrimination. See *id.* at 44a-45a.[1]

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[1] Circuit City's opening brief to the court of appeals (at 25-26) demonstrated the legal insufficiency (and irrelevance) of the anecdotal testimony. The anecdotal witnesses challenged promotion decisions in a dizzying array of clerical, professional, and management positions: account representative, accounting clerk, return check processor, assistant supervisor of collections, assistant supervisor of various customer service functions, media assistant, project coordinator, graphic artist, financial reporting analyst, supervisor, and manager.

Even in their own, carefully selected individual cases, petitioners had great difficulty proving that the discrimination supposedly made possible by Circuit City's "insufficiently regimented" procedures actually had occurred. Indeed, the district court granted Circuit City judgment as a matter of law on the claims of three petitioners at the close of the plaintiffs' case. Pet. App. 45a.

At the end of the trial, the district court instructed the jury to decide "first of all" whether Circuit City had engaged in a "pattern or practice" of discriminatory promotions ***before*** considering whether the three remaining petitioners had established *any* of their individual discrimination claims. C.A. App. 3125-3126; Pet. App. 46a. The district court intended this interrogatory to support a species of one-way class action. If the jury returned a "finding of pattern or practice discrimination, the district court stated that Circuit City would be collaterally estopped from denying the existence of such discrimination at subsequent trials." Pet. App. 44a. On the other hand, a verdict for Circuit City on the "pattern or practice" question would not assist the defense of future litigation brought against it by non-parties.

Presented with the separate "pattern or practice" interrogatory as a preliminary step to finding liability in any individual case, see Pet. App. 46a, the jury found a "pattern or practice" in the abstract — but then rejected 12 of the 15 concrete claims of discrimination that were before it, including both of petitioner McKnight's claims. See *ibid.* The jury found that, in three instances, Circuit City had discriminated by promoting other women ahead of petitioners Lowery and Peterson, and it awarded a total of $16,700 in back pay and compensatory damages. Having been instructed that the "[c]ivil rights laws are difficult to enforce without the threat to defendants of liability for punitive damages" (C.A. App. 3121), the jury awarded a total of $272,000 in punitive damages. Pet. App. 46a.

After trial, the district court entered judgment for Circuit City on petitioners' disparate impact claim, holding that they had failed to identify any "specific elements" of Circuit City's promotion practices that "ha[d] a significant disparate impact on African-American employees." C.A. App. 706 (omitted from petitioners' appendix). In an unprecedented procedural innovation, however, the district court relied on the jury verdict to enter a free-standing "judgment" (also omitted from petitioners' appendix) that Circuit City had engaged in a "pattern or practice" of ***intentional*** discrimination. *Id.* at 700.

Based on that "judgment," the district court ordered Circuit City to restructure personnel procedures at headquarters along the lines suggested by petitioners' diversity consultant. The sweeping decree broadly prohibited Circuit City from "taking any adverse employment action against any African American employee" and required Circuit City to hire specialists in employment diversity, to adopt race-based mentoring programs, to engage in detailed record-keeping (to be measured against *de facto* quotas), and to submit to continuing oversight by petitioners' counsel and experts, as well as by the court itself. See Pet. App. 47a-48a; 108a-116a. The district court also ordered specific relief for petitioner Lowery (petitioner Peterson having left Circuit City), and awarded petitioners' counsel nearly $4 million in attorneys' fees and costs. See *id.* at 48a-49a.

3. The court of appeals stayed the decree pending appeal, except for the injunctive provisions specific to petitioner Lowery. Pet. App. 49a. On the merits, a unanimous panel (Murnaghan, Wilkins, and Hamilton, JJ.) affirmed in part and vacated in part.

The court of appeals affirmed the district court's decision to decertify the purported class, rejecting petitioners' argument that the district court somehow had "los[t] its discretion" to do so. Pet. App. 50a. Observing that "efficiency is one of the primary purposes of class action procedure," *id.* at 52a n.5, the court of appeals held that the district court appropriately

exercised its discretion to decertify the purported class based on "legitimate concerns that trying the suit as a class action would be unwieldy and unfair to Circuit City." *Id.* at 52a.

The court of appeals also vacated the free-standing "pattern or practice" "judgment." It acknowledged that individual plaintiffs "may use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination." Pet. App. 57a. Nevertheless, "individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII" separate from their claims for relief from discrimination they themselves may have suffered. *Id.* at 54a.

The Fourth Circuit affirmed the jury verdict against petitioner McKnight and the dismissal of all claims made by six other petitioners. It explained that four of the dismissed petitioners "failed to establish a prima facie case of discrimination" (Pet. App. 60a), while the other two "failed to demonstrate that Circuit City's articulated reasons for passing them up for promotion were pretextual" (*id.* at 61a). The court of appeals held that petitioners' statistical evidence was insufficient to show pretext because the study did not "adequately control for factors other than race that could account for the disparity in promotions" at Circuit City, "notabl[y]" including the effect of "educational level * * * on promotions at Circuit City." *Id.* at 63a.

Next, the court of appeals affirmed, without analysis, the judgments in favor of petitioners Peterson and Lowery. Pet. App. 64a n.7. The court noted, however, that the record clearly showed "that Lowery and Peterson had problems that, at least partially, led to their being passed up for promotion." *Id.* at 68a. Those problems included Peterson's "deficient" performance "during her two rotations as assistant supervisor" (*id.* at 40a) and Lowery's shortcomings in training recruiters, providing leadership, and coherent communication (see *id.* at 37a-38a). This evidence, which made liability borderline, rendered

the "extraordinary remedy of punitive damages * * * not appropriate" in the absence of "egregious" conduct. *Id.* at 68a.

Given the very limited number of successful claims, the court of appeals substantially narrowed the district court's injunction, leaving in place only the provisions relating to petitioner Lowery. Pet. App. 68a. It vacated the extensive provisions requiring Circuit City to create a "Department of Diversity Management" and implement a wide variety of other programs "subject to Plaintiffs' approval, for which Plaintiffs' counsel [could] apply quarterly for fees and expenses incurred in the monitoring and enforcement of the order." *Id.* at 69a. These "class-wide remedies" with their "labyrinthine provisions for reporting and enforcement" amounted to an abuse of discretion because they "far surpass[ed] those needed — and [we]re far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." *Id.* at 69a.

Although the Fourth Circuit recognized that "occasionally individual relief equates to class-wide relief" (Pet. App. 69a), that was not the case here, and the vacated "pattern or practice * * * 'claim'" provided no basis for "such broad and sweeping relief." *Id.* at 70a. The court of appeals also identified flaws in other parts of the decree ranging from the "go-thy-way-and-sin-no-more provision" that would "impermissibly subject[]" Circuit City "to contempt proceedings for conduct unlike and unrelated to the violation with which it was originally charged" (*ibid.*), to the segregated "career development and mentoring program" for African-Americans only (*id.* at 69a-70a), to the provision that "on its face * * * would prevent Circuit City from taking" any adverse action against any African-American employee "even if the employee indisputably merited the adverse action and the action was undeniably nondiscriminatory." *Id.* at 70a.

Finally, the court of appeals vacated the award of nearly $4 million in attorneys' fees and costs. It noted that "of the fifty

claims filed, the Plaintiffs prevailed on only three," Pet. App. 72a, manifesting "a very low degree of success." *Id.* at 71a.

4. Petitioners sought review from this Court. Their petition (No. 98-972) raised the same two questions presented in this petition (albeit with different phrasing). The first petition also sought review of the Fourth Circuit's rejection of plaintiffs' statistical evidence and challenged the reversal of the punitive damages award. This Court declined to hear the case on the merits but did vacate the judgment and remand the case to the court of appeals for further consideration in light of *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), which addressed only punitive damages issues. See 527 U.S. 1031 (1999). On remand, the Fourth Circuit reinstated the punitive damages award and "slightly modif[ied]" its "instructions to the district court regarding redetermination * * * of attorney's fees and costs." Pet. App. 5a.

ARGUMENT

By no criterion does this case warrant further review. The Court declined to review the two questions presented here at the time they were presented in No. 98-972, and nothing has changed since then to make them any more worthy of review now.[2]

Petitioners alleged 46 individual acts of discrimination in promotions at Circuit City's headquarters; ***43 of those claims were rejected in the district court.*** Perhaps driven by necessity born of the dearth of evidence of actual discrimination, petitioners put forward a theory of "pattern or practice" discrimination, asserting that the ***absence*** of detailed procedures —

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[2] The remand in response to the earlier petition was solely for the purpose of reconsidering the sufficiency of the evidence with respect to punitive damages. Because the disposition of that issue could not in any way have affected the "certworthiness" of the other issues raised in No. 98-972 and raised again here, the Court's earlier action was tantamount to a denial of certiorari on those issues.

procedures that even petitioners' expert conceded had not been shown to reduce discrimination — made it ***possible*** for supervisors and managers scattered across a hundred departments to discriminate intentionally when filling hundreds of vastly different jobs.

The court of appeals correctly rejected petitioners' unprecedented attempt to rely on that "pattern or practice" to avoid their burden of proof under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and to restructure Circuit City's entire promotion system. Instead, it upheld the damages awards to the two petitioners actually found to have suffered isolated acts of discrimination and the injunctive relief related thereto, but otherwise rejected petitioners' claims.

I. THE AFFIRMANCE OF THE DISCRETIONARY DECERTIFICATION OF THE PLAINTIFF CLASS PRESENTS NO ISSUE WARRANTING FURTHER REVIEW

The class certification issues in this case are unremarkable. The Fourth Circuit held nothing more than that the district court did not ***abuse its discretion*** when it required ***these plaintiffs*** to forgo the class mechanism in ***this case***. Pet. App. 53a. That fact-bound determination accords with the analysis of the other courts of appeals to consider similar issues under Rule 23(b)(2) and presents no basis for further review.

A. This Court has emphasized that Rule 23 of the Federal Rules of Civil Procedure vests "broad power and discretion" in district courts "with respect to matters involving the certification and management of potentially ***cumbersome*** or frivolous class actions." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) (emphasis added). The Court recognized that only "sound discretion and use of the tools available" could prevent "administrative chaos" and "class-action harassment." *Ibid.* Petitioners take issue with this view. They suggest that the Court should second-guess the Fourth Circuit's entirely unremarkable holding that, given the nature of the disparate

"class" that petitioners proposed here, the district court acted within its discretion in decertifying the class precisely because it was cumbersome and inefficient.

The petition invokes general policies underlying employment discrimination class actions in an effort to distract the Court from the fundamental peculiarity of ***this*** case and the reasonableness of the decision below. As the Fourth Circuit recognized, the broad principles on which petitioners rely are "beside the point." Pet. App. 53a. The petition simply ignores what it cannot controvert: the disparate plaintiffs' individual requests for significant compensatory and punitive relief swamped the request for injunctive relief and would have made class treatment inefficient, unmanageable, and unfair. *Id.* at 52a-53a.[3] If any further demonstration of that conclusion were needed, it may readily be found in the fact that most of the specific claims that petitioners presented were found to lack merit.

B. Petitioners repeatedly assert (Pet. 11, 12, 13, 16) that the affirmance of the district court's discretionary decertification somehow amounts to the sort of "judicial inventiveness" disapproved in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). Petitioners turn *Amchem* squarely on its head when they advance its ***limitation*** of the scope of permissible class certification as a basis for making class certification

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[3] Petitioners erroneously claim (Pet. 12) that the decision below would prevent ***any*** employment discrimination plaintiff from seeking both individual damages and broad injunctive relief. The closest thing to a common thread linking petitioners' claims was the assertion that Circuit City should have tried to make it harder for supervisors to stray into specific discriminatory actions by using an array of bureaucratic procedures of unproven and highly doubtful efficacy. Nothing in the decision below forecloses the ability of a more cohesive, sensibly constituted class of discrimination plaintiffs — or, for that matter, an individual plaintiff for whom equitable relief depended on the eradication of an identifiable practice (see Pet. App. 69a) — to seek both monetary and injunctive relief.

mandatory whenever an omnibus damages action also asserts a claim for injunctive relief. In *Amchem* this Court forbade lower courts to ***waive*** the ***minimum*** requirements of Rule 23 in order to certify classes for settlement. Nothing in *Amchem* suggests that any case that arguably meets the requirements of Rule 23 ***must*** be certified as a class action regardless of the circumstances. Likewise, not one word of *Amchem* alters the longstanding recognition that a district court should not maintain a class action that does not "advance the efficiency and economy of litigation which is a principal purpose of the procedure." *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 159 (1982) (quoting *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 553 (1974)). To the contrary, *Amchem* reiterated the universal view that "Rule 23(b)(2) ***permits***" — but does not require — "class actions for declaratory or injunctive relief." 521 U.S. at 614 (emphasis added).[4]

The Fourth Circuit properly rejected the view that district courts somehow "lose[] their discretion to certify or decertify [a] class" whenever employees seeking millions of dollars in compensatory damages for a hodge-podge of individual discrimination claims — in different departments and vastly disparate positions — also seek employer-wide injunctive relief. Pet. App. 50a. Petitioners offer no support for such an extreme view here. Indeed, as the Fourth Circuit observed, this "Court has rejected the proposition that merely alleging a pattern or practice of discrimination automatically entitles plaintiffs to class certification." Pet. App. 53a, citing *Falcon*,

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[4] In *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), the Court again disapproved "adventurous application" of a subsection of Rule 23 to certify classes. *Id.* at 845. Although the Rule "on its face" was "open to a more lenient" and inclusive reading, the Court rejected the putative class in *Ortiz* in light of "historical antecedents" to the Rule. *Id.* at 843. As in *Amchem*, the Court in *Ortiz* curbed the judicial expansion of Rule 23 without in any way undercutting the discretion of a district court ***not*** to certify a class that it believed met the facial requirements of the Rule.

457 U.S. at 155-157, and *East Texas Motor Freight Systems* v. *Rodriguez*, 431 U.S. 395, 405-06 (1977).

C. Petitioners do not identify a single conflicting decision by a court of appeals reviewing the refusal to certify a class of discrimination plaintiffs seeking significant monetary damages as well as injunctive relief. Indeed, the only courts of appeals to address similar attempts to misuse the class action device have likewise held that class certification under Rule 23(b)(2) is ***not*** mandatory — if anything taking a stronger stand against such proposals. See *Lemon* v. *International Union of Operating Engineers*, ___ F.3d ___, 2000 WL 733577 (7th Cir. June 9, 2000); *Jefferson* v. *Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Jackson* v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997).

In *Allison*, the Fifth Circuit affirmed a district court's refusal to certify a class of employment discrimination plaintiffs who were dispersed across multiple "skill groups" and "functional areas" and who asserted commonality based on "challenging general hiring, training and promotional policies," such as "use of subjective decision-making." 151 F.3d at 407. The Fifth Circuit affirmed the district court's exercise of its "substantial discretion in determining whether to certify a class action" (*id.* at 408), relying in part on the problems of "efficiency and manageability" presented by the proposed class (*id.* at 415). The Fifth Circuit concluded, consistently with the decision here, that class certification may be denied where a widely heterogeneous class of employees seeks both monetary and injunctive relief. *Id.* at 418. In fact, the Fifth Circuit went further than the court below, holding that in such cases injunctive relief plainly is not predominant, so that a district court would necessarily abuse its discretion if it *did* certify a plaintiff class. See *id.* at 415-418.

Likewise, the Eleventh Circuit in *Jackson* issued a writ of mandamus to decertify a class consisting of persons claiming

that a motel chain discriminated against them. Although the plaintiffs in *Jackson* sought injunctive relief against a supposed "practice or policy" of discrimination as well as damages, the court did not find Rule 23(b)(2) to be even "arguably fulfilled" by such a disparate class of damages-seeking plaintiffs (130 F.3d at 1005), presumably because the injunctive relief against the alleged practice was not predominant over the damages claims (see *id.* at 1005-1006). The court revoked certification after finding that Rule 23(b)(3) also was not satisfied.

Since the Court last considered petitioners' arguments on this point in No. 98-972, another circuit has reinforced the cohesion among the courts of appeals. The Seventh Circuit twice has followed *Allison* and held that Rule 23(b)(2) does not permit certification of broad and disparate classes of damages plaintiffs in employment discrimination actions. In *Jefferson*, the court accepted an interlocutory appeal and vacated certification of such a class under Rule 23(b)(2). The court held "a no-notice, non-opt-out class" may be certified under Rule 23(b)(2) "only when monetary relief is incidental to the equitable remedy," that is, "tangential." 195 F.3d at 897, 898. Likewise, in *Lemon*, the Seventh Circuit evaluated a putative class of 400 union members who alleged that the business manager of their local union "was racist and manipulated the referral system to pass over minorities and women." 2000 WL 733577, at *1. In rejecting class certification under Rule 23(b)(2), the court of appeals observed that "individual claims for compensatory or punitive damages typically require judicial inquiry into the particularized merits of each individual plaintiff's claim," contrary to the "presumption of cohesion and homogeneity" that underlies that Rule. *Id.* at *2.

Throughout this litigation, petitioners suggested that dozens or even hundreds of class members would press individual damages claims. Indeed, petitioners' failed effort to extract a $15 million settlement from Circuit City (see C.A. App. 4361-4363) confirms that petitioners placed primary emphasis on the pecuniary aspects of this case. The fairness,

efficiency and manageability concerns cited by the district court, and reiterated by the court of appeals, all flow from the fact that common injunctive relief did not at all predominate over the individual, damages-related issues. Indeed,in certifying the class, the district court could not bring itself to state that equitable relief was predominant in this case, much less to explain how that could be so. See Pet. App. 136a. Thus, if the district court erred, it was in certifying the class under Rule 23(b)(2) in the first place, not in decertifying this disparate pseudo-class. These circumstances make this case an especially poor vehicle for further review.

C. Petitioners try to disguise their pursuit of a novel rule of mandatory class certification under Rule 23(b)(2) by professing a concern for distinguishing the requirements of that Rule from those of Rule 23(b)(3). Petitioners must hope that this Court will overlook what the Fourth Circuit actually held: "[W]e do not mean to imply that the factors for certifying a Rule 23(b)(3) class should be imported into Rule 23(b)(2) classes." Pet. App. 52a n.5. Rather, the court of appeals continued, in terms that echo this Court's instructions in *Sonotone*, 442 U.S. at 345, "because efficiency is one of the primary purposes of class action procedure, * * * in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome." Pet. App. 52a n.5.

The actual holding of the Fourth Circuit renders irrelevant the supposedly conflicting statements made by other courts of appeals in decisions, rendered outside the discrimination context, where proof of plaintiff-specific damages was ***not*** at issue. The feasibility of class treatment is quite different when an action seeks ***only*** injunctive relief, or injunctive relief combined with incidental restitutionary remedies that are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415 (distinguishing *Forbush* v. *J.C. Penney Co.*,

994 F.2d 1101, 1105 (5th Cir. 1993)).[5] Just such an absence of circumstance-specific damages awards characterized the cases cited at Pet. 15-16, in which courts observed, in full accordance with the decision below, that compliance with all of the factors enumerated in Rule 23(b)(3) was not a ***general prerequisite*** to ***eligibility*** for certification under Rule 23(b)(2).[6] The asserted conflict is illusory.[7]

D. Petitioners' true motivation in asking this Court to review the class certification issue is their hope to evade their burden of proof by gaining the benefit of the presumption of discrimination that was imposed in *Teamsters* v. *United States*, 431 U.S. 324 (1977). See Pet. 19-20. Petitioners' eagerness to

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[5] Petitioners claim that *Forbush* conflicts with the decision below, but the Fifth Circuit amply distinguished the issues in *Allison* (which replicate those here) from those in *Forbush*. See 151 F.3d at 415. Any tension among Fifth Circuit decisions is a matter for that court — which declined to rehear *Allison* en banc, *id.* at 434. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[6] See *Penland* v. *Warren County Jail*, 797 F.2d 332, 334 (6th Cir. 1986) (injunctive relief for jail conditions); *Norris* v. *Frame*, 585 F.2d 1183, 1189 n.18 (3d Cir. 1978) (injunctive relief for pre-trial detainees; dictum on class certification); *Alliance to End Repression* v. *Rochford*, 565 F.2d 975, 976 n.2, 979 (7th Cir. 1977) (challenge to police surveillance; damages not certified); *Elliott* v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977) (challenge to government benefits recoupment procedure, damages not awarded), aff'd in part and rev'd in part *sub nom. Califano* v. *Yamasaki*, 442 U.S. 682 (1979).

[7] Petitioners also assert a conflict with *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553-1558 (11th Cir. 1986), cert. denied, 479 U.S. 883 (1986), in which the Eleventh Circuit held that a plaintiff class had been erroneously decertified under Rule 23(a). The *Cox* court did not discuss Rule 23(b)(2) in that Title VII case, brought in an era when that statute provided only equitable relief. The Fourth Circuit accurately recognized that its holding was "not in conflict" with *Cox*. Pet. App. 59a. *Allison*, not *Cox*, represents Eleventh Circuit law on the certification issue presented here.

avoid their burden of proof is understandable in light of their dismal success rate: their 46 claims of discrimination, tested by normal legal standards, were found wanting 43 times.

The "pattern or practice" claim, on which petitioners rely for class certification, reduces to an assertion that Circuit City's procedures did not adequately stamp out every opportunity for intentional discrimination. The generally insubstantial individual complaints, however, were not meaningfully fortified by the still flimsier "pattern or practice" evidence. The linchpin of that evidence was a statistical analysis so unsound that the Fourth Circuit — in a determination not now contested — held it insufficient even to help prove pretext in an individual case, Pet. App. 63a, much less to serve as the basis for shifted burdens of proof or a massive injunction.

Petitioners want the Court to assume that intentional discrimination is pervasive even though, when put to the test of proving that assumption, petitioners failed more than 90% of the time.[8] The shortcomings of petitioners' claims confirm the soundness of applying the normal burdens of proof.

Plaintiffs also suggest (Pet. 19-20) that they were entitled to a *Teamsters* presumption in their individual cases regardless of class certification. That argument is not properly before the Court. See S. Ct. R. 14.1(a). Whether the burden of proof may be reversed in an individual case is not among the questions presented by the petition, which address class decertification and the scope of relief. See Pet. i. Shifting the burden of proof in individual cases is not "fairly included" within those questions. S. Ct. R. 14.1(a).

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[8] The extreme nature of petitioners' position is clear from their suggestion (Pet. 10, 21) that failure to preclude jury consideration of punitive damages in an individual discrimination case *ipso facto* supports class certification, sweeping injunctive relief, and a reversal of the burden of proof.

In any event, petitioners' contention lacks merit. See No. 98-972, Br. in Opp. 20-22. There is nothing to petitioners' suggestion (Pet. 19) that the Fourth Circuit "elevated form over substance" in holding that the decertification decision precluded the *Teamsters* presumption. As the Fourth Circuit observed, this "Court has never indicated that an inference of discrimination should arise in an individual case until the plaintiff has proved ***all*** elements of a *prima facie* case. See *McDonnell Douglas*, 411 U.S. at 802." Pet. App. 58a (emphasis in original).

Not surprisingly, petitioners cannot identify a single decision by a court of appeals that adopts their proposed reversal of the burdens. To the contrary, as the Fourth Circuit recognized, in the rare instances when this issue has been broached even obliquely, "[t]he relevant case law on the subject" in other courts of appeals "supports [the] conclusion" it reached. Pet. App. 59a (citing decisions from the Fifth and Seventh Circuits). And there certainly is no "direct conflict" (Pet. 20) between the decision in this case and the dictum in *Cox*, 784 F.2d at 1559. In *Cox*, the Eleventh Circuit recertified the class, *id.* at 1558, before ordering that the retrial proceed as a "pattern and practice suit," *id.* at 1562, and suggesting that, in some other case, the *Teamsters* presumption might apply regardless of class certification. *Id.* at 1559. See also Pet. App. 59a-60a.

Few employment discrimination cases could be less well suited to application of the *Teamsters* presumption than this one. The presumption is designed to address the situation in which a practice of an employer operates to produce fairly consistently discriminatory outcomes. Here, there is no identifiable "practice," much less any causal relationship between practice and outcome; moreover, the record in this case, in contrast to cases like *Teamsters*, shows at most a rare incidence of discriminatory promotion decisions within Circuit City's framework of decentralized decision-making. Only by traveling through the looking glass could one suppose that these circumstances rationally justify use of a presumption of discrimination

at a facility where African-Americans, overall, have received almost exactly the proportion of promotions that their numbers in the full-time workforce would suggest, and where the proportion of African-Americans in every EEO category, including managerial positions, ***exceeds*** the proportion in the relevant labor pool.

II. THE MODIFICATION OF THE INJUNCTION IN THIS CASE PRESENTS NO BASIS FOR FURTHER REVIEW

Petitioners suggest that because this is a civil rights case, there are no limits on the scope of injunctive relief. Indeed, in plaintiffs' view, "[t]he decertification of the class" — like the 93% failure rate of the individual plaintiffs, and the ability to prove discrimination against only two petitioners — "should have no effect on the scope of injunctive relief." Pet. 22. To the contrary, the Fourth Circuit correctly applied settled equitable principles to the unusual facts of this case in narrowing the decree to what could be justified in order to afford the prevailing plaintiffs complete relief.

A. The Fourth Circuit confronted a decree that, to remedy three isolated instances of discrimination — two of them denying the same promotion to the same person — ordered Circuit City to "revise its program of promoting employees" throughout its hundred departments and submit to having all promotions evaluated against a *de facto* quota; to create and staff a "Department of Diversity Management"; to comply with "labyrinthine provisions for reporting and enforcement"; to submit "[m]any aspects of the new programs * * * to Plaintiffs' approval"; and to pay "Plaintiffs' counsel * * * quarterly for fees and expenses incurred in the monitoring and enforcement of the order." Pet. App. 69a, 111a-115a. The Fourth Circuit's catalogue of these and other astounding aspects of the decree speaks for itself. See *id.* at 68a-70a.[9]

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[9] Petitioners prudently say nothing about the decree's effort to

Petitioners provide no sound reason for this Court to second-guess the Fourth Circuit's unremarkable conclusion that "such sweeping remedies far surpass those needed — and are far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." Pet. App. 69a. Indeed, there was ***no*** showing at trial that a lack of bureaucratic procedures at Circuit City actually ***caused any*** discrimination, or that the imposition of such procedures would reduce it. See p. 5, *supra*; C.A. App. 2816-2817. The Fourth Circuit's approach is completely in line with this Court's jurisprudence unequivocally limiting injunctive relief to the scope necessary to remedy "the injury-in-fact that" a private "plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). Certainly, as this Court held in *Lewis* — which ***was*** a class action — "two instances of actual injury" do not warrant system-wide injunctive relief, *id.* at 356, no matter how broadly the offending "practice" may be characterized.

The petition quotes (at 21-22) a misleading patchwork of broad statements about make-whole relief and suggests that the court of appeals' decision to narrow the unprecedented injunction in this extraordinarily weak case somehow conflicts with decisions of this Court. In a few class actions and cases brought by the government, this Court has upheld system-wide remedies altering specific, identified practices with specific discriminatory effects, such as the seniority system modified in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976), and that altered only in its application to provably harmed individuals in *Teamsters*, 431 U.S. at 356, 362, 371-372. Petitioners — who could never pinpoint an enjoinable practice that had a discriminatory effect — can identify no

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convert the entire corpus of federal civil rights legislation into the basis for contempt proceedings against Circuit City, the race-specific mentoring program, and the forbidding of ***any*** adverse action against ***any*** African-American employee. Pet. App. 69a-70a.

precedent that approaches the breadth and intrusiveness of the injunction narrowed by the Fourth Circuit here.

Not only was the relief in each of the cited cases more closely tailored to the violations at hand, but those cases bore no resemblance to this one. By contrast with petitioners' case, which relied on shaky statistics to support a theory that insufficiently regimented personnel practices permitted individual decisionmakers to discriminate in individual instances, the decisions of this Court on which petitioners rely involved years of "overt segregation," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 409 (1975), and "longstanding or egregious discrimination" including contemptuous resistance to prior anti-discrimination decrees. *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 448 (1986); see *United States* v. *Paradise*, 480 U.S. 149, 153 (1987). In the circumstances of this case, the Fourth Circuit appropriately limited the decree to an "award [of] make-whole relief to the individuals" who were provably "victimized." *Sheet Metal Workers*, 478 U.S. at 448.

B. Incredibly, petitioners repeat their claim (Pet. 23; see No. 98-972, Pet. 23 & Br. in Opp. 18-19) that the decision below conflicts with a dictum in *Meyer* v. *Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981). In *Meyer*, the Fifth Circuit reversed the ***entire*** injunction at issue (*id.* at 374), but stated that in some other, hypothetical cases "injunctive relief designed to assist a party will accidentally assist persons not before the court" (*ibid.*). Likewise, the Fourth Circuit explicitly acknowledged that, when a specific, identifiably discriminatory practice has injured an individual plaintiff, "individual relief equates to class-wide relief," Pet. App. 69a, and some of its prior decisions have taken that tack. *E.g.*, *Evans* v. *Harnett County Board of Education*, 684 F.2d 304, 306 (4th Cir. 1982) (relief awarded in individual action enjoined school district from hiring and assigning principals based on race). That was not the case here, where the injunction simply reproduced the predilections of petitioners' diversity consultant, who admitted that he had no evidence that his

favored procedures actually reduced discrimination. Even if conflicting dicta could support review, there is no conflict here.

C. Petitioners suggest that the Fourth Circuit was foreclosed from vacating the more extravagant portions of the district court's decree because the jury had found a free-standing "pattern or practice" of discrimination before rejecting 12 of the 15 alleged instances of actual discrimination that were before it. The Fourth Circuit held that, although "[e]vidence of a pattern or practice of discrimination" might be probative of individual claims (see Pet. App. 57a-58a), there is no such thing as a free-standing "pattern or practice" cause of action or judgment in an individual case. Accordingly, there is no basis for relief broader than that appropriate for the two prevailing individual plaintiffs.

As already noted, petitioners failed to show that discrimination in promotions occurred in 43 of the 46 instances that they hand-picked after a thorough 30-month investigation for inclusion in this suit — presumably the strongest cases found among Circuit City's workforce of 1,500 African-American employees. Thus, petitioners proved no "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters*, 431 U.S. at 336. Nothing remotely worthy of certiorari arises from the Fourth Circuit's fact-bound determination that the proof in this case did not justify the "sweeping" and "burdensome" remedies imposed by the district court. Pet. App. 69a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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